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Supreme Court of the United States

October Term, 1940

No. 661

FORD MOTOR COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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(a) The discharges.

In our petition we have asserted that the right of an employer to take precautions against violent seizure of his property or the use of sit-down or slow-down strikes inside the plant, or against other acts of sabotage, including the right to discharge employees belonging to an organization committed to such unlawful activities, and threatening to engage in them, is a question of public importance, particularly in the present national emergency (Pet. 19-21).

The Board does not deny that the question presented is of sufficient importance to warrant review and determination by this Court. It argues only that the writ should be denied, in respect of this issue, because "the question is not involved" in the case; that the question involves an assumption that "petitioner either had reason to fear or did fear that the U. A. W. would attempt to seize its plant"; and that such an assumption is "unwarranted by anything in the record" (Br. 11). But neither the findings of the

Board or the evidence before it, nor the decision of the court below, supports the Board's contention.

On the contrary, the Circuit Court of Appeals, whose decision is the one of which we seek a review, expressly found that petitioner both had reason to fear and did fear such an attempt to seize its plant (R. VI, 619).

That finding is supported, and in fact compelled, by evidence in the record offered by the Board itself.[1] Indeed, Board's counsel themselves questioned witnesses at the hearing upon the obvious assumption that petitioner was apprehensive of such an attempt, and sought to extract from petitioner's witnesses the admission that the fear of a sit-down strike was the cause of discharges of men who belonged to the U. A. W.[2] Moreover, the Board's own witnesses supported their position that they had been discharged for union membership or sympathy by testimony indicating that the petitioner was apprehensive that such membership or sympathy made them potential sit-down strikers.[3]

The Board further contends that the right of an employer to discharge members of an organization publicly committed to violent and unlawful seizure of its plant is not involved in the case, because "the evidence introduced by

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[1]See petition, p. 5, f. n. 1.

[2]*E. g.*, R. III, 1700-1702.

[3]For example, one of the discharged men testified that the official who discharged him accused him of trying to "take this plant over and run it for us" (R. II, 1098), and another testified that he was accused of "trying to steer the trouble there like they had . . . over to General Motors and Chrysler" (R. II, 916). In fact, the Board's testimony as to one of the discharges would, if accepted, establish that the man was discharged because of petitioner's belief that he had ordered a sit-down strike to take place (R. III, 2083; see R. I, 696-697, 700, 702, 713).

petitioner was designed to prove a precisely contrary point, that the employees' union affiliation had nothing to do with their discharge" (Br. 12). But that evidence the Board itself rejected, and its findings to the contrary were deemed by the court below (except in respect of one employee) to have the requisite evidentiary support. The court having so held, we have not considered the issue one which under its rules we could properly ask this Court to review on certiorari.

Therefore we must accept the Board's findings that the petitioner discharged 23 men because of their membership in, activities on behalf of, or sympathy with, the complaining union; and it is upon such findings that the issue of law arises, since that union was (as indisputably appears, as was recognized by the court below, and as is entirely consistent with the Board's findings) an organization which petitioner had reason to fear would attempt to seize its plant.

The Board's attempted distinction of *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 305 U. S. 240, and other cases cited (Pet. 20-21), rests upon the assertion that petitioner was not actually apprehensive that the union or its members would attempt to engage in the unlawful activities condemned in those decisions (Br. 12-13). Since, as the Circuit Court of Appeals found, the petitioner did fear such an attempt, and had reason to fear it, the distinction falls.

(b) The Board's failure to consider material facts and circumstances.

In our petition we have contended that the court below, in refusing to set aside the Board's order because of its

failure to take into consideration material facts and circumstances, though the court itself recognized their materiality (R. VI, 617-619), decided an important question of law in a way probably in conflict with the applicable decisions of this Court (Pet. 21-22).

The Board does not deny that the question presented is of sufficient importance to warrant review. It argues, contrary to the decision of the court below, that the sit-down strikes and petitioners' apprehensions of, and preparations to resist, such a strike in its plant are immaterial to the issues (Br. 15-16); and it seeks to justify its failure to consider those facts and circumstances by arguing that there was in fact no threat of a sit-down strike at petitioner's plant and no fear on petitioner's part that such a strike might be attempted (Br. 13-15).

The latter contention is based upon evidence in the record alleged to establish (though the Board did not so find) that the U. A. W.'s threat of a sit-down strike ended with the decisions of this Court on April 12, 1937, upholding the National Labor Relations Act, and that after that date petitioner had no reason to fear and did not fear a sit-down strike in its plant.

Not only did the Board not so find, but the court below expressly found to the contrary, holding that as late as May 26, 1937, the day of the riot, petitioner "had reason to fear that there would be an attempt to seize the gates of the River Rouge plant and to invade it for the purpose of staging a sit-down strike" (R. VI, 619).

That the decisions sustaining the Act did not mark the end of the sit-down strikes is abundantly clear from *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 482, in which the Court described "a lawless invasion of petitioner's plant

and destruction of its property by force and violence of the most brutal and wanton character" occurring on May 4, 1937. The portions of the record cited by the Board (Br. 14-15) to support its argument merely confirm our position.[1] Indeed, evidence in the record, offered by the Board itself, shows that at petitioner's plant in Richmond, California, the U. A. W. inaugurated a sit-down strike on April 23, 1937, and on May 25, one day before the riot involved in the present case, seized the gates of that plant and excluded supervisory officials and office workers from the premises (Bd. Ex. 106; R. IV, 84).

That the sit-down strike epidemic continued, and extended from industry to industry, long after this Court's decision sustaining the Act, and ended only upon this Court's decision in *N. L. R. B.* v. *Fansteel Metallurgical Corp., supra,* are facts so notorious as to be within the scope of judicial notice (see R. VI, 434-435, 506-543).

The Board's more general argument—that the sit-down strikes and petitioner's apprehensions of, and preparations to resist, such a strike in its plant are immaterial to the issues—is sufficiently answered by the Board's own statement of the facts. Thus, in arguing in support of the conclusion that petitioner was "responsible" for the alleged

[1]Obviously, a newspaper reporter would not have questioned Mr. Henry Ford, after the Act was sustained by this Court, as to what the Company "would do in the event of a strike at the Rouge plant", if the threat of such a strike were not recognized as still existing. And the statement of the President of the U. A. W. that a "strike to force Henry Ford to recognize the Union will not be *necessary now*" was obviously an attempt to mislead employees into thinking that, because the Act had been sustained, the Company was *ipso facto* obliged to recognize the Union, regardless of the choice of a majority of the employees, and also necessarily implied that if such recognition were not granted forthwith, a strike would be "necessary".

assaults, the Board states that they were not a "spontaneous" outbreak and that, "For some time prior to May 26 petitioner had been aware that the U. A. W. intended to distribute leaflets *and had maintained a large number of guards at the plant gates* (R. V, 309)" (Br., 7).

This argumentative association of the plan of the U. A. W. to distribute literature and the maintenance of guards at the plant gates, as made in the Board's brief, epitomizes its entire decision, which discloses no reason whatever for petitioner to have maintained guards at the gates other than a purpose to interfere with the distribution of literature; whereas, in fact, the Board's own testimony shows that such guards were maintained at the gates long before the U. A. W. even contemplated distributing literature at the gates, and were maintained at all hours of the day and night, at times when the U. A. W. obviously would not attempt to distribute literature (R. I, 434; cf. R. V, 293).

Likewise, the argumentative statement that the assaults were not a "spontaneous" outbreak proceeds on the unspoken premise that, because no overt violence was attempted by the U. A. W. on May 26, there could have been no individual motivation for the extreme hostility to the U. A. W.'s visitation to the plant evinced by those employees of petitioner who participated in the riot, whereas it is clear that the lawless activities of the U. A. W., and its threat to interfere with the livelihood of Ford employees by a sit-down strike, furnished a very natural basis for resentment toward the U. A. W. on the part of some of those 80,000 employees.

It is obvious that the significance and probative force of almost every item of evidence dealt with in the Board's decision could be properly determined, and infer-

ences and conclusions could properly be drawn therefrom, only by considering the true background of sit-down strikes and judging the evidence—both as to petitioner's preparations to use force and the activities of individual employees hostile to the U. A. W.—in the light of that background.

It is the failure of the Board to consider that background—its studied refusal to make even the slightest reference to the sit-down strikes in either of its decisions—which the court below recognized as a failure to consider material facts and circumstances, and which raises the question upon which we seek a review, *viz.*, whether the court below in that situation was not required, as a matter of law, to set aside the Board's order.

(c) The Board's failure to make basic findings of fact.

In our petition we contended that, the Board having failed to make basic findings of fact necessary to support its conclusion that petitioner was "responsible" for assaults committed by certain of its employees, or to reveal the theory upon which such a conclusion was reached, the court below was required to set aside the Board's order, and was not justified in enforcing the order in the absence of such basic findings (Pet. 22-23).

The Board does not deny that its decision is barren of findings which would make applicable to petitioner the doctrine of *respondeat superior* (see Pet. 9). Nor does it deny that having stricken from its second decision the finding, contained in its first decision, that petitioner planned and intended the riot, its decision fails to indicate the basis for its conclusion that petitioner was "responsible". The Board merely argues that the "petitioner's responsibility is self-evident" (Br. 18).

The Board's inability or unwillingness to state the basis for its conclusion, even before this Court, strongly indicates that it regarded petitioner as "responsible" for the riot for the same reason that it regarded the sit-down strike background as immaterial to the issues, namely, the unexpressed theory that any activity of the petitioner, regardless of its occasion or purpose, which contributed to bringing about any impediment to the accomplishment of the U. A. W.'s objectives, regardless of their lawless nature, constituted an unfair labor practice. If such a theory, which appears to be the only one that reconciles all of the Board's action in the case,[1] had been expressed in its decision, its error would be obvious. But since the Board failed to express such theory or any other theory, or to make any basic findings of fact from which it would follow, without further inferences of fact and as a matter of law, that petitioner engaged in unfair labor practices by reason of acts of its employees, it is impossible to determine what theory the Board relied upon, or what inferences of ultimate fact it had in mind in reaching its conclusion.

The rule that findings must embrace the basic facts necessary to support the ultimate conclusions is thus peculiarly applicable, for it is impossible to determine from the Board's decision whether it decided the case on any theory which, if known to the Court, would be sustained.

(d) The Trial Examiner's misconduct.

In our petition we argued that the decision of the court below, in failing to hold that the Examiner's misconduct constituted a sufficient ground for setting aside the order,

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[1]See Pet. 6-7.

is in conflict with the decisions of other circuits in *Inland Steel Co.* v. *N. L. R. B.*, 109 F. (2d) 9, and *Montgomery Ward & Co.* v. *N. L. R. B.*, 103 F. (2d) 147.

The Board, while conceding that the conduct of the Examiner was not entirely proper, argues that petitioner nevertheless received a fair hearing, apparently on the theory that a party cannot be deprived of a fair hearing except by the exclusion of relevant evidence. But the Examiner did, in important respects, unfairly restrict the scope of petitioner's examination of witnesses for the plain purpose of excluding testimony which might be favorable to petitioner (*e.g.*, R. Vol. I, pp. 130, 134-5, 136, 172, 600-1). And the Board does not deny that the Examiner questioned interested U. A. W. witnesses in a highly improper fashion for the plain purpose of eliciting only such testimony as would help the Board's case,[1] or that he questioned petitioner's witnesses with open hostility and contempt,[2] or that he abused counsel for petitioner, arbitrarily discriminated against petitioner in his rulings on evidence, and sought in other ways to hinder and impede the presentation of petitioner's case.[3]

There can be no doubt that such conduct tended to encourage Board witnesses to depart from the truth, to intimidate petitioner's witnesses, and to hinder petitioner's counsel in the presentation of its case.

The Board also suggests (Br. 21) that the petitioner was not deprived of a fair hearing by the Examiner's misconduct, because the Examiner filed no intermediate report.

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[1]For record references, see Pet. 9, f. n. 2.

[2]For record references, see Pet. 10, f. n. 1.

[3]For record references, see Pet., p. 10, f. n. 2.

But the examiners in the *Inland Steel* and *Montgomery Ward* cases likewise filed no reports; and the prejudicial effect of encouraging witnesses to exaggerate and embroider their testimony, of intimidating petitioner's witnesses, and hindering petitioner's counsel in presentation of its case, can hardly be cured by the exclusion of the Trial Examiner from participation in the case after the hearing.

In contending that the petitioner may "not now be heard to urge that the hearing was unfair" for lack of objections (Br. 20), the Board gives the erroneous impression that petitioner's counsel did not object to the Examiner's conduct during the hearing. In fact, petitioner's counsel objected to different types of unfair conduct of the Examiner on numerous occasions, and in almost every instance in which he did so, his objections were abruptly cut off by the Examiner or summarily overruled.[1] Although the Board argued in the court below that "if appropriate objections had been made, it may be that the matters now complained

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[1]Thus petitioner's counsel objected to the Examiner's arbitrary restrictions upon the introduction of testimony as to the background of sit-down strikes and lawless conduct engaged in by the U. A. W., imposed during the initial stages of the hearing; in fact, even Board's counsel protested against the Examiner's arbitrary conduct in this respect (R. I, 134-135, 136, 172, 600-601). He objected or attempted to object to the manner of the Examiner's questioning of witnesses (R. I, 202; II, 1388-1389; III, 1778-1780); to the Examiner's abusive treatment of petitioner's counsel (R. I, 305, 695-696); to the Examiner's refusal to allow him to make objections during the examination of Board's witnesses, as well as to many other manifestly arbitrary rulings on questions of evidence (*e. g.* R. I, 305, 306-307, 308-309, 695-696; III, 1763, 1920-1921); and to the Examiner's bulldozing of petitioner's witnesses and his approval of similar tactics by Board's counsel (R. I, 184, 695; II, 1441-1443; III, 1553, 1669-1670, 1698, 1860-1861).

of would not have occurred," no such contention can reasonably be made. The Board's argument reduces itself simply to this point—that since no general motion was made before the Examiner that he should set aside the hearing because of his own unfair conduct, no objection thereto might thereafter be made. The Board does not suggest that the Examiner would have had any power to grant such a motion, or that he would have granted it if he had had such power. The proper place to urge such objections was before the Board, and the petitioner did make appropriate and timely objection before the Board, as has been shown (Pet. 10-11).

The court below, in remarking that "no motion to suppress evidence [was] made before the examiner or the Board prior to the announcement of the Board's original decision" (R. VI, 615), failed to consider the Board's own procedure and the rules and regulations which it had in effect at the time of the hearing and thereafter. Except in cases where it followed the procedure of its first decision in this case—a procedure now concededly improper—the Board's regulations provided that the trial examiner, after the close of the hearing, should issue a tentative or intermediate report; that the respondent should then, within 10 days, file its exceptions to such report and "to any other parts of the record (including rulings upon all motions or objections)."

Had the regular procedure been followed, instead of the erroneous procedure which led to the remand of the case and the making of a second decision, petitioner would have filed exception to the Trial Examiner's conduct as part of its exceptions to his report, and would have made timely request for relief based thereon. It was the Board's

attempt to "streamline" its procedure which deprived petitioner of an opportunity to make its objections before the Board itself at the usual time and in the normal way.

The Board apparently argues (Br. 21) that the *Inland Steel* and *Montgomery Ward* cases are entirely different from this one because the Examiner failed to manifest his bias in every single way specified in those decisions. Although the Board refers to several types of unfair conduct as having been present in those cases and states that "No such circumstances are present in the instant case" (Br. 21), the only type of conduct cited by it which is in fact not present in this case is the ordering of discussions off the record; and in neither such decision was any particular stress put upon that type of conduct. The hostile attitude toward respondent's witnesses, the imposition of arbitrary restrictions upon cross-examination and arbitrary distinctions and rulings upon questions of evidence were stressed in one or both such decisions; and those, and other types of unfair conduct as well, exist in this case. In those cases, the courts set the order aside by reason of the "inevitability of substantial prejudice" by reason of such a course of conduct—a doctrine which the court below recognized but did not follow.

(e) The Board's procedure in reaching its decision.

The Board seeks to justify the action of the court below in denying various motions of petitioner, and thus effectively preventing petitioner from obtaining a trial upon the justiciable issues raised by its answer and cross-petition as to the Board's procedure in reaching its decision, on two primary grounds: (1) that petitioner's allegations were not supported by any showing that the allegations had "any

basis in fact" (Br. 23), and (2) that any issue as to the Board's procedure in reaching its decision was foreclosed by the formal procedural steps taken by the Board after the remand of the case to it for reconsideration (Br. 25).

The first of these contentions disregards the fact that petitioner's motions were supported by an affidavit setting forth public statements made or endorsed by the Chairman of the Board and sworn testimony of members of its staff giving *prima facie*, and in some respects conclusive, support to petitioner's allegations that in this case the Board delegated the exercise of substantially all its judicial functions to subordinates, who reached their own determinations as to the facts after consideration not only of the formal record but also of the so-called "informal file", together with *ex parte* information as to the merits of the case obtained orally, and that the Board accepted such determinations of its subordinates without itself considering the evidence or petitioner's contentions (R. VI, 567-601).

The second of these contentions disregards the fundamental requirements of a full and fair hearing, as enunciated by this Court in its decisions in *Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1, and *Ford Motor Company* v. *N. L. R. B.*, 305 U. S. 364, and assumes that they relate to form and not to substance. It is apparently the Board's theory that because, after the remand, it issued a proposed decision and permitted petitioner to file exceptions and a brief addressed thereto and to make oral argument, the issue of fair hearing is foreclosed, even if all the allegations made by petitioner are true.

No doubt the issuance of a proposed decision (even though the Board had not itself considered the evidence)

and the receipt of exceptions thereto and of a brief and oral argument thereon were appropriate steps in the proceeding. But petitioner has alleged, and shown *prima facie* and in some respects conclusively, that thereafter the case was actually decided by unauthorized subordinates on the basis of both formal and informal files and other *ex parte* communications (Pet. 11-14). As this Court stated in *Morgan* v. *United States,* 304 U. S. 1, 20, "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." And in that case the Court further said that due process of law requires that, "Those who are brought into contest with the Government in a quasi-judicial proceeding * * * are entitled to be fairly advised of what the Government proposes *and to be heard upon its proposals before it issues its final command*" (p. 18). The Court was, of course, referring to a hearing upon the proposals by the official or body vested with the power of decision, and not by its subordinates.

The mere physical receipt of exceptions and a brief gave petitioner no "hearing" by the Board upon the proposals of the subordinates if, as petitioner has alleged, no member of the Board read or considered petitioner's exceptions or brief. And the physical act of listening to petitioner's oral argument, a transcript of which was then turned over to the subordinates who decided the case, like the physical receipt of exceptions and a brief, did not constitute a "hearing" on the proposed decision.

In its opinion on rehearing on the second appeal in the *Morgan* case (304 U. S. at p. 23), this Court reiterated its statement in its first opinion (298 U. S. at pp. 481-482)

that, "To give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them." And when this Court stated in the *Ford* case (305 U. S. at p. 372) that it was "sufficient for setting aside the order" that the Board *"had not considered the evidence and made its own findings,* but had adopted as its own a decision proposed by its subordinates without affording petitioner an opportunity *to be heard thereon",* it was obviously referring to a hearing in the substantive sense, as defined in both decisions in the *Morgan* case, and to a hearing by the Board and not by its subordinates.

If the procedure in fact followed was that which petitioner has alleged and shown *prima facie* to have been followed, petitioner, although advised of the proposals embodied in the proposed decision, was never accorded a "hearing" on them by the Board, and was neither advised of nor heard upon the proposals which were thereafter made by the Review Attorneys to the Board—which were the proposals upon which the Board's decision was actually based, and which were made only after consideration of highly prejudicial *ex parte* reports and communications from the prosecutors and other persons.

Petitioner does not contend that it was improper for the Board to have subordinates take the evidence, sift and analyze it, and prepare a proposed decision, or that it was necessarily the duty of the Board at any stage in the proceeding to read the evidence. It is petitioner's contention that, under the decisions of this Court in the *Morgan* and *Ford* cases, if the Board chose to have such assistance from its subordinates, it could not properly permit such sub-

ordinates to consider informal files and other written and oral *ex parte* communications from the prosecutors, and that the Board itself was required to consider the evidence and petitioner's exceptions and brief to the extent necessary to enable the Board itself to decide upon the validity of the contentions which the petitioner addressed to the proposals of the Board's subordinates. The determination of the facts upon consideration of evidence and argument is of the essence of the judicial function vested in the Board, and clearly may not be delegated to subordinates, particularly where the subordinates are permitted to consider *ex parte* reports from the prosecutors and other persons relating to the merits of the case.

f. *Failure of the Board to act at a meeting.* The Board erroneously states that there is nothing other than the "lack of a formal recitation" to indicate that the Board's final decision and order were not made at a meeting of the Board. It is shown in the petition (p. 15) that seven different interlocutory orders of the Board appear in the record to have been made at meetings of the Board, and that the Board failed to supplement the record to show that its decision and order were made at any meeting, although it had voluntarily supplemented the record to supply other defects therein. The Board points in its brief (p. 27) to several orders which do not recite that they were made at Board meetings, but all but one of the orders thus cited by the Board are orders signed only by the Secretary of the Board, relating to the time for argument and for filing briefs, and do not even purport to have been made by one or more members of the Board acting individually. The conclusion is thus inescapable from the record, and from the Board's

failure to supplement it, that, although interlocutory orders (other than purely ministerial acts of fixing dates for hearings and for the filing of papers) were made at meetings of the Board, the Board's decision and order were not made at any meeting of the Board, but merely by the individual acts of two of its members in signing their names to a piece of paper.

The Board, while not denying that all final orders of the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, and the Securities and Exchange Commission show upon their face that they are made and entered at meetings of such commissions, asserts that orders of the Board of Tax Appeals and the National Mediation Board and the Federal Power Commission do not appear to be made at meetings. But the statutes under which both the National Mediation Board and the Board of Tax Appeals are established expressly provide for the exercise of the functions of such bodies by single members thereof. See Railway Labor Act, 45 U. S. C. § 154; Internal Revenue Code, 26 U. S. C. §§ 1103(c), 1117(a), 1118(a).

The Act not only provides that "the *Board* shall state its findings of fact and shall issue * * * an order * * *" (§ 10(c)), but also provides that two members of the Board shall constitute a quorum[1] (§ 3(b)), thus clearly revealing the Congressional intent that the Board shall act at meetings thereof, upon notice to all members, and not by the action of individuals, not taken at any meeting.

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[1]A "quorum" is "Such a number of the officers or members of any body as is, *when duly assembled*, legally competent to transact business." *Webster's Dictionary*. (Italics supplied.)

The Board's disregard of the fundamental requirement that an administrative body may act only at a meeting legally convened upon notice to all members, which requirement the Act clearly makes applicable to the Board, requires that the Board's order be set aside for this reason alone, and is also further evidence of the looseness of the Board's procedure at the time when this case was pending before it and of its impatience with procedural requirements, all of which to it appear technical, but conformity with which is the basis for the conclusiveness of its findings and is the "inexorable safeguard" which the due process clause assures. See *Morgan* v. *United States,* 298 U. S. 468, 481; Mr. Justice Brandeis concurring in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73.

g. *The Board's bias and prejudgment and its failure to reconsider the case.* The Board asserts categorically that the press releases of the Board and the public statements of one of its members and its General Counsel, all relating specifically to this particular case and made and issued prior to its purported "reconsideration" of the case, show nothing to support petitioner's charges that the Board entertained a fixed bias and prejudice against petitioner and accorded petitioner the forms of a hearing only for the purpose of making a record which, in the opinion of the Board, would sustain a second decision and order adverse to petitioner (Br. 28). But the Board fails to suggest any possible explanation for such press releases and statements other than such bias and prejudgment and a determination to keep petitioner "convicted" by the Board in the eyes of the public and petitioner's employees, despite its

withdrawal of the case for "reconsideration", and despite the setting aside of its first decision and order.

The bias and prejudgment thus publicly revealed cannot be disregarded on the specious ground, urged in the Board's brief, that in its final decision and order the Board modified, in certain respects, the findings which had been contained in its original and proposed decisions. It might as well be argued that in a damage suit the defendant was foreclosed from contending that the trial judge was disqualified by reason of his public statements revealing bias and prejudgment, because he granted the plaintiff smaller damages than were requested in the complaint, or because he gave judgment for the plaintiff on most, but not all, of his several separate causes of action. We should suppose that, even if the Board were utterly prejudiced and partisan, it would nevertheless have availed itself of the opportunity to revise its decision in the light of petitioner's exceptions and brief, in order that it might issue a final decision which would seem to the Board and its staff less likely to be reversed upon review.

No doubt the circumstances of the remand were such as to encourage the Board to adopt a partisan attitude in its reconsideration of the case, to identify its interests with those of the complaining union, and to attempt to justify its first decision and order by issuing a second decision and order against petitioner. It would be thought that under these circumstances the Board would have made every effort to maintain at least an outward public appearance of impartiality. Its utter failure to do so establishes that it entertained an overwhelming prejudice and did not intend—or was unable—to reconsider the case fairly and

impartially, as required by due process of law, and as contemplated by this Court in affirming the order of remand.

Dated January 30, 1941.

Respectfully submitted,

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